PT 00-19
Tax Type: Property Tax
Issue: Government Ownership/Use

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

McDONALD'S CORPORATION, APPLICANT	**No:**	**98-PT-0107 (97-16-1047) (97-16-1049)**
v.	**P.I.N.S:**	**12-08-100-006-8516 12-08-100-006-8518**
DEPARTMENT OF REVENUE STATE OF ILLINOIS	**Alan I. Marcus Administrative Law Judge**	

RECOMMENDATION FOR DISPOSITION PURSUANT TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCE: Mr. Thomas J. McNulty and Ms. Angela Dietz of Neal, Gerber & Eisenberg on behalf of McDonald's Corp. (hereinafter the "applicant").

SYNOPSIS: These consolidated matters come to be considered pursuant to applicant's motions for summary judgment. Applicant filed its motions after the Illinois Department Of Revenue (hereinafter the "Department") issued determinations in these matter on November 6, 1998. Said determinations found applicant's interests in real estate identified by Cook County Parcel Index Numbers 12-08-100-006-8516 and 12-08-100-006-8518[1] (hereinafter collectively referred to as the "subject properties")

1. This case originally involved consolidated appeals from cases formerly docketed by the Department's Office of Local Government Services as 97-16-1046, 97-16-1047 and 97-16-1049. However, applicant withdrew its appeal as to Docket No. 97-16-1046, (a case which pertained to the exempt status of real estate identified by Cook County Parcel Index Number 12-08-100-006-8490), by way of correspondence dated July 26, 1999. This withdrawal eliminates any case and controversy as to whether County Parcel Index Number 12-08-100-006-8490 is subject to real estate taxes for the 1997 assessment

were to be assessed as leaseholds, and therefore subject to 1997 real estate taxes, under Section 9-195 the Property Tax Code, 35 **ILCS** 200/1-1, *et seq* (hereinafter the "Code"). The underlying controversy arises as follows:

Applicant filed two separate applications for Property Tax Exemption, which sought to exempt its interests in the subject properties from the leasehold assessment provisions contained in Section 9-195 of the Code, with the Cook County Board of Review (hereinafter the "Board") on June 12, 1998. The Board reviewed these complaints but made no recommendation as to the taxable status of each parcel. The Department reviewed the Board's recommendation and issued the aforementioned determinations on November 6, 1998. Applicant filed timely appeals to these determinations and later filed motions for summary disposition as to both subject properties. Following a careful review of the motions and the supporting documentation, I recommend that applicant's motions be denied and that its interests in both subject properties be subject to leasehold assessments for the 1997 assessment year.

FINDINGS OF FACT:

1. The Department's jurisdiction over these matters and its positions therein are established by the admission of its determinations in these matters, issued by the Office of Local Government Services on November 6, 1998. Dept. Group. Ex. No. 4.
2. The Department's position in both of these matters is that applicant's interests in the subject properties are subject to leasehold assessments under Section 9-195 of the Code. *Id.*

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year. Therefore, said parcel remains subject to such taxes and the focus of this Recommendation is limited to ascertaining whether Cook County Parcel Index Numbers 12-08-100-006-8516 and 12-08-100-006-8518

3. One of the subject properties is identified by Cook County Parcel Index Number parcel 12-08-100-006-8516 and is located in Terminal 1, Concourse C, of O'Hare Field (hereinafter the "Airport"). Dept. Motion Ex. Group Ex. No. 1; Applicant Motion Ex. No. 3.

4. The other subject property is identified by Cook County Parcel Index Number parcel 12-08-100-006-8518 and located in Terminal 3, Concourse L of the Airport. *Id*.

5. The airport is owned and operated by the City of Chicago (hereinafter the "City"), which is a municipal corporation and home rule unit of local government established pursuant to Article VII of the Constitution of the Statue of Illinois. *Id*.[2]

6. Applicant is a Delaware for-profit corporation with its principal place of business located in Oak Brook, Illinois. Applicant Motion Ex. No. 3.

7. Applicant and the City entered into a "license agreement" (hereinafter the "agreement") in 1996. The basic terms and conditions of this agreement, which is to run for a term of 10 years, are as follows:

   A. The City authorizes applicant to use the subject properties and other expressly identified "Retail Premises,"[3] only for purposes of conducting certain specified "Concession Operations"[4] therein;

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are subject to same.

2. The City's fee interests in the subject properties are exempt under Section 15-60 of the Property Tax Code (35 **ILCS** 200/15-60) and are not at issue herein. Administrative Notice.

3. The subject properties are included within the broader category of "Retail Premises," all of which are identified via a series of definitions contained in the agreement and drawings attached thereto. Applicant Motion Ex. No. 3.

4. The term "Concession Operations" is defined in the agreement as meaning "the 'Retail Operations' of a concession operated by [applicant] at the Domestic Terminals." "Retail Operations" are, in turn and in relevant part, defined as "retail businesses supplying food, goods and services to the public customarily provided in airport retail concessions or in commercial retail centers …[.] *Id.*

B. The City further authorizes applicant to operate and maintain certain "Storage Premises,"[5] the location of which are to be designated by the City's Commissioner of Aviation, as adjuncts to its "Concession Operations[;]" and,

C. In exchange, applicant agrees to: (1) abide by all terms and conditions set forth in the agreement; and, (2) pay certain specified fees throughout the term of the agreement.

Applicant Motion Ex. No. 3.

8. The fees applicant must pay are, under terms of the agreement, as follows:

A. An annual fixed fee, payable in monthly installments, equal to the sum of $30.00 per square foot for the first year in which the agreement is in effect, which $30.00 shall be increased by 3%, compounded annually, during each subsequent year of the term; plus,

B. The greater of: (1) an annual percentage fee, payable in monthly installments, equal to 15% of applicant's "Gross revenues;"[6] or, (2) a minimum guarantee fee (hereinafter the "MGF").

Id.

9. The agreement specifically states that there shall be no MGF for the first year of the term. It goes on to provide that the MGF for the second year of the term is $1,000,000.00, and further, that the MGF for all subsequent years shall be equal to

5. The "Storage Premises" are generally located within the Domestic Terminals. Their precise location is, however, not disclosed in the agreement because said location is subject to designation by the City's Commissioner of Aviation. *Id.*

6. The agreement defines "Gross Revenues" as meaning, in pertinent part, "the total amount in dollars of the actual sale price … and all other receipts of business conducted in or from [the subject properties]." *Id*.

the greater of (a) $1,000,000.00; or, (b) 80% of the percentage fee payable in the previous year of the term. *Id*.

10. Under terms of the agreement, applicant is responsible for paying 1/12 of the MGF, together with 1/12 of the annual fixed fee, on or before the 1st day of each calendar month. It is also responsible for paying the amount, if any, by which the annual percentage fee exceeds the MGF, no later than the 15th day of each month during which the agreement is in effect. *Id*.

11. Other relevant terms and conditions of the agreement are as follows:

TERM/ CONDITION	**RIGHTS/RESPONSIBILITIES**

Use	• Applicant must use subject properties solely as venues for operating McDonald's restaurants therein;
	• Applicant must operate such restaurants in a manner that reflects favorably upon the City and the Airport, and in doing so, must adhere to certain Airport Concession Operation Standards[7] imposed by the City and ensure that its employees:
	  • Act in a courteous, businesslike and professional manner at all times;
	  • Welcome all travelers and provide directions to all who ask;
	  • Make change for the public regardless of whether a purchase is made; and,
	  • Accept as suitable payment for all sales of merchandise having an aggregate value of $10.00 or more any of at least three nationally recognized credit cards, including without limitation, American Express, Visa, MasterCard and Discover
	• Applicant must take all commercially reasonable steps to maximize the restaurants' Gross Revenues and otherwise amplify the volume of business transacted thereat.

TERM/ CONDITION (CONT'D)	**RIGHTS/RESPONSIBILITIES**
Hours Of Operation	• At minimum, applicant must remain open for business between 6:00 a.m. and 11:00 p.m. daily; • Except in cases of emergency, applicant must "continuously remain open daily from (1) one hour prior to the first flight scheduled to depart from the concourse[s] in which the [subject properties] are located, through one (1) hour after the last flight is scheduled to depart or arrive [therein];" • Applicant must also remain open during such emergency hours as the City's Commissioner of Aviation (hereinafter the "Commissioner") may deem necessary.

7. The Standards consist of various rules, regulations, policy directives, forms, etc. that the City promulgates for the governance of all matters pertaining to the conduct of businesses that operate airport concessions. Such matters include, *inter alia*, standards for employee conduct, product quality reviews, financial audits and other quality controls which the City enforces through various rights of inspection. For a detailed recitation of these and other Standards, *see*, Applicant Motion Ex. No. 3.

Menu	• Applicant must adhere to a "Concession Merchandise and Price List" which is attached to the agreement and sets forth the types of merchandise that applicant is allowed to sell at the subject property; • This list details a series of menu items that applicant is permitted to sell and includes items such as hamburgers, cheese burgers, fries, chicken nuggets, salads, shakes, iced tea, hot cakes and other breakfast items.[8]

Employee Uniforms & Salaries	• Applicant's employees must, at all times, wear:
	  • Clean and neat uniforms
	  • Identification tags; and,
	  • Security badges issued by the City's Department of Aviation
	• Applicant shall comply with all provisions of the Prevailing Wage Act, 820 **ILCS** 130/0.01 *et seq*;
	• Applicant shall also pay all of its employees unconditionally and not less often than once per month.

Advertising, Marketing and Signage	• Applicant may, at its own expense, install and operate necessary and appropriate identification signs "at" (i.e. on the exterior areas of) the subject properties, provided that such signs conform to the size, height, location, design and other criteria established by the Commissioner; • Any criteria the Commissioner imposes shall permit applicant to use its standard colors and logos. • The above requirements also apply to any signs that are visible in the areas of the Domestic Terminals that are accessible to, and intended for use by, the general public; • Applicant shall have the right to install and display "within" the subject properties (i.e. in the actual restaurant areas themselves) such temporary, promotional signs and advertising materials as it generally uses in connection with the identification and operation of its business, provided and only so long as same are: (1) in compliance with all applicable governmental rules and regulations; and, (2) within the requirements established by the City; • Applicant shall not distribute any advertising, promotional circulars, etc. in the Airport without prior written consent from the Commissioner; • Applicant shall perform the levels and types of advertising, public relations and marketing that it sets forth in an annual marketing plan, which it must submit for the Commissioner's written approval no later than September 30 of the year before the year in which the plan is to take effect.
TERM/ CONDITION (CONT'D)	**RIGHTS/RESPONSIBILITIES**
Tax Payments	• Applicant is responsible for paying any and all taxes, assessments, and charges levied against the subject properties or imposed against applicant's business.
Assignment	• Applicant has no rights of assignment, except that it may transfer its rights to occupy the subject properties, and operate McDonald's restaurants therein, to a franchisee who will exercise such rights of occupancy and operation in accordance with the all of the terms and conditions set forth in the agreement; • Applicant need not obtain the City's consent before effectuating such a transfer.
Rights Of Inspection	• The Commissioner may, upon due notice, enter onto the subject properties for purposes of inspecting the Improvement Areas and/or ensuring that applicant's construction complies with the applicable specifications; • The City also reserves the right to inspect and monitor the Improvement Areas once construction is completed, so as to ensure that applicant is in compliance

8. For a detailed listing of the food items that appear on the Concession Merchandise and Price List, *see*, Applicant Motion Ex. No. 3.

	with all provisions of the agreement and the City-imposed standards that are incorporated by reference therein.
Property Rights	• Applicant shall maintain title and ownership to all of the personal property (e.g. trade fixtures, equipment, inventory, etc.) that it installs and maintains on the subject properties; • The City shall own all other property located on the subject property including, *inter alia*, any permanent improvements applicant makes to the subject properties (i.e. the Improvement Areas) or any non-trade fixtures that applicant installs therein; • The City shall also own the Shell and Core areas.
Maintenance	• The City shall, at its sole cost and expense, replace and maintain the Shell and Core areas, unless the damage thereto is caused by applicant or any of its agents; • If the damage to the Shell and Core is caused by applicant or any of its agents, then the City shall repair any damage done at the sole cost and expense of the applicant; • Applicant is responsible for the following maintenance: (1) providing all cleaning and janitorial services to the subject property; (2) ensuring that the subject properties are maintained in "first class" condition throughout the entire term of the agreement; (3) cleaning and maintaining all grease traps and drain lines that serve the subject property not less than twice per month; (4) keeping any ducts, vents, or other openings that service the restaurant area free from the accumulation of dust, grease dirt or other exhaust materials; (5) providing any filters necessary to prevent such accumulation; (6) maintaining all electrical cables, conduits, wiring systems, fire alarm systems, electrical panels and associated equipment that serve the subject properties; (7) cleaning all restrooms and associated plumbing located in and serving the subject properties; and, (8) removing all spillage that occurs within the subject properties and within 5 feet thereof. • Applicant is also responsible for performing any necessary pest control. However, the Commissioner may also elect to provide applicant with pest control services and charge applicant a reasonable fee therefor; • Applicant is also responsible for any maintaining any utility lines that are located within the actual restaurant areas and serve same; • Applicant is further responsible for maintaining any utility lines that service only restaurant areas but run from such areas to the main entry point of the Domestic Terminals. However, the City may also maintain these particular utility lines and charge applicant for the reasonable cost of such maintenance.
TERM/ CONDITION (CONT'D)	**RIGHTS/RESPONSIBILITIES**

Events of Default/ Termination of Agreement	• The following are pertinent[9] events of default occasioned by applicant's failure to:
	  • Make fee payments in full when due, provided that applicant does not cure same within five days of the date on which it receives written notice of its failure to pay. However, applicant shall not be entitled to cure if it makes more than 3 late payments within the same year, in which case the fourth delinquent payment shall constitute an event of default without the necessity for further notice thereof;
	  • cure any breaches of applicant's non-monetary obligations contained in the agreement, (such as those which require it to charge "Street Prices"), provided that applicant does not remedy such breaches within the applicable cure period;
	  • maintain appropriate insurance coverage.
	• In the event that an event of default should occur, the City, acting through the

9. For a exhaustive listing of the events of default, *see*, Applicant Motion Ex. No. 3.

	Commissioner, may perform any of applicant's obligations under the agreement except that of operating a McDonald's restaurant on the subject properties. The City may also exercise any the following remedies: (1) terminate the agreement, exclude the licensee from the subject properties and recover any and all appropriate monetary damages including, *inter alia*, any delinquent amounts due under the agreement; (2) declare any such delinquencies immediately due and payable; (3) re-enter and repossess the subject properties; (4) subject any or all parts of such properties to new "license" agreements; (5) employ self-help to remove any of applicant's remaining inventories, equipment, machinery, etc; and, (6) seek and obtain specific performance or other appropriate injunctive or equitable relief.
Storage	• The location each of the "Storage Areas" that is to be included as part of the subject properties, but not contained within the actual restaurant areas themselves, is identified on drawings that are attached to the agreement; • Applicant must use all areas so identified only for storage and office space; • Applicant may also use incidental portions of separate facilities, known as the "Storage Premises," for office space; • The "Storage Premises" are generally located within the Domestic Terminals. However, their precise location is subject to designation by the Commissioner.
Change in Areas	• The Commissioner cannot exercise the right of withdrawal during the first two years that applicant is open for business; • In the event of a withdrawal, the Commissioner may, but shall not be obligated to, require applicant to relocate to a comparable location; • If applicant decides to accept relocation, then the Fixed Fee and MGF shall be reduced until applicant opens the new location.
Construction Responsibilities	• Divided between the parties such that: (1) applicant is responsible for constructing the "Improvement" Areas, or those areas of the subject properties wherein applicant actually operates the McDonald's restaurants; but (2) the City is, with very minor exceptions, responsible for constructing the "Shell and Core Areas," or those areas of the subject properties that are immediately adjacent to, or directly surround, such restaurants.

Id.

CONCLUSIONS OF LAW:

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 **ILCS** 5/2-1005(c). Applicant's unrefuted evidence removes all issues of material fact from this case. Evangelical Alliance Mission v. Department of Revenue, 164 Ill. App.3d 431, 439 (2nd Dist. 1987). Therefore, the only remaining source of controversy herein is a legal issue, that being whether the applicant's interest in both subject properties is subject to assessment under Section 9-195 of the Property Tax Code.

Section 9-195 states that:

> Except as provided in Section 15-55 [which governs exemption of property owned by the State of Illinois], when property which is exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the property taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his or her assignee. Taxes on that property shall be collected in the same manner as property that is not exempt, and the lessee shall be liable for those taxes.

35 **ILCS** 200/9-195.

Applicant challenges the imposition of leasehold assessments herein on grounds that its interests in the subject properties do not qualify as a "leasehold estate[s]" within the meaning of Section 9-195. Rather, applicant posits that the written agreements pursuant to which it holds said interests constitute non-taxable licenses to use otherwise exempt property.

The legal significance of distinguishing between licenses and leaseholds is that the former are not taxable interests, provided that they truly qualify as licenses for the use of exempt property. Jackson Park Yacht Club v. Department of Local Government

Affairs, 93 Ill. App. 3d 542, 547 (1st Dist. 1981). The latter are subject to taxation under the Section 9-195 of the Property Tax Code. *Id*.

Whether a contractual agreement is a lease or a license is determined, not from the language used, but from the legal effect of its provisions. *Id*. at 546. Hence, the facts that applicant and the City have affixed the title "license agreement" to their contract, and repeatedly used the word "license" to describe the contract's overall structure, do not compel the conclusion that said contract creates tax exempt license interests in the subject properties as a matter of law.

That conclusion is derived by examining pertinent legal definitions. First, "an instrument that merely gives to another the right to use premises for a specific purpose, the owner of the premises retaining the possession and control of the premises, confers no interest in the land … is a mere license." In re Application of Rosewell, 69 Ill. App.3d 996, 1001 (1st Dist. 1979) (hereinafter "Rosewell"). Thus, "a license is an authority to do some act on the land of another, without passing an estate in the land, and 'being a mere personal privilege, it can be enjoyed only by the licensee himself, and is therefore not assignable so that an under tenant can claim privileges conceded to a lessee.' *Id.*, citing Taylor's Landlord and Tenant, § 14.

A leasehold, however, "consists of the right to the use and possession of the demised premises for the full term of the lease." People *ex rel*. Korzen v. United Airlines, 39 Ill.2d 11 (1968). Accordingly, a lease has been defined as "[w]hatever is sufficient to show that one party shall divest himself of possession and the other party shall come into for a terminate time and for a fixed rental amounts to a lease." Miller v. Gordon, 296 Ill. 346, 350 (1921).

The essential requirements of a lease are: (1) a definite agreement as to the extent and bounds of the leased property; (2) a definite and agreed term; and (3) a definite and agreed price of rental and manner of payment [citations omitted]. People v. Metro Car Rentals, 72 Ill. App. 3d 626, 629 (1st Dist. 1979). No particular words are required to create a lease *Id*. Rather, the existence of a lease depends upon the intention of the parties and this intention must generally be inferred from the circumstances of the particular case. *Id*. Generally, however, the question of possession will determine the matter. *Id*.

In applying these factors herein, it must be remembered that "one who claims an exemption from a property tax has the burden of proving, by clear and convincing evidence, that his or her property comes within the exemption, and the presumption is against the intent of the State to exempt property from taxation." Stevens v. Rosewell, *supra*, at 61-62. Therefore, all debatable legal or factual questions must be resolved in favor of taxation. *Id*.

Applicant's uncontested evidence removes any debatable factual questions from this case. Such evidence does not, however, eliminate all debate as to the central legal question in this case, that being whether the terms and conditions set forth within the "four corners"[10] of applicant's agreement with the City are more consistent with a non-taxable license or a taxable leasehold. For the following reasons, I conclude said agreement is more akin to the latter.

10. Applicant has confined the scope of this motion for summary judgment, and limited the context of the argumentation in support thereof, to analysis of the legal effect of the provisions that are contained within "four corners" of the operating agreement admitted as Applicant Motion Ex. No. 1. These limitations form the framework for all remaining analysis herein, as the interests of administrative and judicial economy require that I respond only to those arguments that applicant actually raises.

First, it is applicant, rather than the City, that retains possession and control of the subject properties. The agreement provides applicant with such possession via the provisions that pertain to the City's default remedies, principal among which are the City's right to reenter and retake possession if applicant defaults. Such a provision is consistent with applicant's quiet enjoyment of the subject properties, at least to the extent that it indicates that applicant will not be dispossessed so long as it is not in default. Furthermore, from a practical perspective, I fail to see how the City can possibly *retake* possession of the subject properties without first transferring possession thereof to the applicant.

If this were not the case, then the divestiture provisions would become superfluous, for the City would not need contractual authorization to repossess that which is already within its lawful custody. It would likewise render the provisions that require the City to provide applicant with *prior* notice of any inspections unnecessary, because the City would not be required to give such notice, or otherwise obtain permission to enter the subject properties, if it were in lawful possession thereof.

Each clause and word used in a contract must be given effect without rejecting any words as meaningless or surplusage. Thomas Hoist Co. v. Newman Co, 365 Ill. 160, 166 (1936); Hufford v. Balk, 113 Ill.2d 168, 172 (1986); Dowd & Dowd v. Gleason, 181 Ill.2d 460,479 (1998). Accordingly, contractual constructions that create meaningless terms or surplus verbiage are to be avoided. *Id.* My previous analysis demonstrates that such avoidance cannot be effectuated herein unless the agreement is interpreted as vesting applicant with possession and control of the subject properties. Because possession is generally determinative of the inquiry herein, (People v. Metro Car Rentals,

supra, at 629), the conclusion that this agreement provides applicant with taxable leasehold interests in said properties appears inescapable.

Applicant seeks to alter this conclusion by pointing out that the Commissioner reserves the right to relocate applicant from the subject properties if the Commissioner deems such relocation necessary to meet Airport needs. However, the agreement plainly states that the Commissioner cannot relocate applicant for a minimum of two years after it first opens for business. Thus, the City's right of relocation is not as absolute as applicant would have it appear. Rather, this right is: (1) conditional because it cannot be exercised unless and until the Commissioner makes a decision concerning Airport needs; (2) speculative in the sense that it merely reserves a right which may never be exercised throughout the entire term of the agreement; and ultimately, (3) of absolutely no use to the City during the first two years applicant is open for business.

Applicant also cites the provisions of the agreement which call for applicant's employees to wear certain forms of identification, including airport security badges. These provisions appear to be mechanisms for enforcing whatever security regulations the City and other authorities impose on all persons who work at the Airport. Thus, their legal effect is to ensure applicant's compliance with those legal standards rather than place constraints on applicant's use of the subject properties or interfere with its quiet enjoyment thereof.

The same may be said of the provisions which require applicant to comply with the Prevailing Wage Act, 820 **ILCS** 130/0.01, *et seq*. (hereinafter the "Act"). In substance, this Act requires all public bodies, such as the City, to pay all laborers,

mechanics and other workers engaged in the construction of public works[11] wages that are not less than the generally "prevailing rate of hourly wages for work of a similar character on public works in the locality in which the work is performed …[.]" 820 **ILCS** 130/3. *See also,* 820 **ILCS** 130/2. (Limiting application of Act to "the wages of laborers, mechanics, and other workers employed in other public works … by any public body[12] and to anyone under contracts for public works").

Here, the agreement specifically limits applicant's construction responsibilities to those associated with building the actual restaurant areas. These areas are located within a public facility, that being the Airport. Hence, applicant falls within the purview of the Act while the restaurant areas are under construction. However, that purview is one that arises by operation of law. Thus, it is in no way indicative of the City's control over the wages that applicant is legally required to pay its construction workers.

More importantly, the Act does not apply to the food service workers that applicant employs *after* it completes construction. These employees are the ones that actually manage and implement the daily operating needs of applicant's restaurants. Therefore, it is the City's capacity to exercise control over their wages that is of relevance herein. Because the City in fact exercises no such control, it must be concluded that applicant retains autonomous authority to dictate the wages of its restaurant employees.

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11. The Act defines "public works" as meaning "all fixed works constructed for public use by any public body … whether or not done under public supervision or direction, or paid for wholly or in part by public funds." 820 **ILCS** 130/2.

12. The Act defines public body as meaning "the State [of Illinois] or any officer, board, or Commission of the State or any political subdivision or department thereof, or any institution supported in whole or in part by public funds, authorized by law to construct public works or to enter into any contract for the construction of public works, and includes every county, city town, village … or municipality of the state …[.]" 820 **ILCS** 130/2.

Applicant further posits that the provisions which require it to charge "Street Prices" are consistent with a license. However, the City's control over "Street Prices" is illusory because the agreement specifically states that such prices are to be determined by reference to the prices that applicant charges at *its own* restaurants in downtown Chicago. That being the case, business reality dictates that it is the applicant, and not the City, which actually controls the pricing scheme.

Business reality further dictates that other provisions of the agreement are not indicative of a license arrangement. These provisions which include, *inter alia*, those that require: (1) applicant's employees to make change for the public regardless of whether a purchase is made; (2) applicant to accept certain specifically enumerated forms of payment, including specifically named credit cards; (3) applicant to abide by the City's Airport Concessions Operation Standards; and, (4) applicant to observe certain limitations as to the size, height and location of its exterior advertising, are designed to ensure that applicant conducts its business in a manner that projects the best possible image to, and augments the convenience of, Airport patrons.

Projecting such an image enables applicant to fulfill its predominant contractual obligation, which is "to take all commercially reasonable measures …" to maximize the volume of business transacted at the subject properties. (Applicant Motion Ex. No. 3). This in turn enables applicant to derive significant pecuniary benefits, to wit, enlarged profits, from the agreement.

These benefits are reciprocal, at least insofar as: (1) applicant is contractually obligated to pay the City a percentage of its Gross Revenues as compensation for its use of the subject properties; (2) such Gross Revenues are, by contractual definition,

inclusive of all retail sales that applicant makes at said properties; and, (3) maximizing the volume of such retail sales necessarily increases applicant's Gross Revenues and thereby enhances the amount of remuneration the City receives from applicant. Thus, it appears that the form of that remuneration is not unlike the percentage rental arrangements found in many commercial leases.

Based on the foregoing, I fail to see how the agreement, read as a whole, creates anything other than leasehold interests for the operation of applicant's retail food concessions. However, any residual uncertainties as to the taxable status of these leaseholds are completely eradicated by that provision of the agreement wherein applicant specifically agrees to pay all taxes and assessments levied against the subject properties.

Applicant negotiated this provision of the agreement, and agreed to be bound the terms thereof, as part of an arm's length business transaction with the City. It further accepted the consequences of these provisions in exchange for the pecuniary benefits associated with conducting its retail operations at the subject properties. Consequently, applicant would be unjustly enriched if it were permitted to reap these benefits without incurring the detriment of liability for taxation that is part and parcel of its agreement with the City.

This is especially true where, as here, applicant agreed to incur such liability without obtaining a right of reimbursement from the City. The absence of such a right is what distinguishes this case from In Re Application of Rosewell v. City of Chicago, 69 Ill. App.3d 996 (1st Dist. 1979), wherein the document in question specifically provided

that the operators were to "advance all .. taxes assessed" and then obtain reimbursement therefor from the City. Rosewell, *supra* 999-1000, 1003.

Here, applicant cannot transfer to the City any of the costs associated with its fulfilling its contractual liability. In this sense, applicant's financial position is no different than that of any other commercial tenant that incurs such liability. Thus, the economic dynamics of this agreement are inconsistent with those found to be indicative of a non-taxable license in Rosewell.

Based on the foregoing, I conclude that the agreement at issue herein, when viewed in its totality, creates taxable leasehold interests in the subject properties. Consequently, applicant is not entitled to judgment as a matter of law herein. Therefore, its motion for summary judgment should be denied.

WHEREFORE, for all the aforementioned reasons, it is my recommendation that applicant's interest in real estate identified by Cook County Parcel Index Numbers 12-08-100-006-8516 and 12-08-100-006-8517 remain subject to leasehold assessments under Section 9-195 of the Property Tax Code.

June 16, 2000
Date

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Alan I. Marcus
Administrative Law Judge